

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RANDALL V. HOLT, II,	:	CIVIL ACTION NO. 1:11-CV-0786
Plaintiff	:	(Judge Rambo)
v.	:	(Magistrate Judge Smyser)
BRIAN BLEDSOE, et al.,	:	
Defendants	:	

M E M O R A N D U M

Plaintiff, a federal prisoner proceeding pro se, commenced this action on April 25, 2011. On May 5, 2011, the magistrate judge to whom this matter was referred, reviewed the complaint pursuant to 28 U.S.C. § 1915A and determined that the complaint failed to state a claim upon which relief could be granted. Plaintiff was granted leave to proceed in forma pauperis, his motion for appointment of counsel was denied, and he was ordered to file an amended complaint (doc. 7).

On May 25, 2011, Plaintiff filed an amended complaint. The amended complaint named as defendants 22 officials or officers of the United States Penitentiary at Lewisburg, Pennsylvania and one officer at the United States Penitentiary at Terre Haute, Indiana. The amended complaint alleges the defendants violated his Eighth Amendment right by being deliberately indifferent to a serious risk of harm and failure to abate the known risk.

The magistrate judge reviewed the amended complaint pursuant to 28 U.S.C. § 1915A and construed the amended complaint as asserting *Bivens*¹ claims against the defendants based on an Eighth Amendment violation. After reviewing the claims against all defendants, and noting the requirements to state a claim under the

¹See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Eighth Amendment, the magistrate judge recommended that the amended complaint be dismissed as to defendants Bledso, Heath, Drees, Rear, Fosnot, Maiorana, Adami, Rodamell, Hepner, Unknown SIS Officer, Murray, Yost, Edinger, Campbell, Yohe, Loss, Hornberger and Unknown Recreation Escort Officer because it failed to state a claim upon which relief could be granted.

On July 8, 2011, this court adopted the report and recommendation of the magistrate judge, dismissed the defendants above,² and remanded the case to the magistrate judge. The magistrate judge had previously directed service of the amended complaint upon the remaining defendants (doc. 11, June 7, 2011). On August 9, 2011, the remaining defendants, Dunkelberger, Crawford, Flemming, Howard and Unknown Number One Z-Block Officer, filed a motion to dismiss or in the alternative for summary judgment (doc. 24). On August 12, 2012, these defendants filed a brief in support of the motion and a statement of facts in support thereof (docs. 27 & 28). The magistrate judge treated the motion as one for summary judgment. By order dated September 19, 2011, the magistrate judge ordered plaintiff to file on or before October 7, 2011, a brief in opposition to the motion for summary judgment and a statement of materials facts (doc. 29). On October 11, 2011, Plaintiff filed a brief in opposition to the motion for summary judgment (doc. 30), but failed to file a statement of material facts.

On January 11, 2012, the magistrate judge filed a report in which he recommended that defendant Loss be dismissed for failure to state a claim, that defendant Howard be dismissed as this court has no jurisdiction over him; that summary judgment be granted in favor of Dunkelberger, Crawford and Flemming; that plaintiff be granted leave to file an amended complaint to attempt to assert a claim

²The order inadvertently left out defendant Loss. That omission will be corrected in the order accompanying this memorandum.

against the United States pursuant to the Federal Tort Claims Act (“FTCA”) (doc. 31). No objections were filed. On February 8, 2012, the court adopted the report and recommendation, directed the filing of a second amended complaint by February 28, 2012, and remanded the case to the magistrate judge (doc. 32).

On February 9, 2012, plaintiff filed a motion to file objections to the magistrate judge’s report and recommendation out of time (doc. 33), and objections to the report and recommendation (doc. 34). In his motion to file objections out of time, plaintiff claims that USP Colemen II, at Coleman, Florida, was placed on administrative lockdown until January 26, 2012. Plaintiff received the report and recommendation on January 16, 2012. He claims that this lockdown did not permit him access to the law library, and he was unable to obtain postage or paper in order to timely file objections. The local rules, as recited in the magistrate judge’s notice appended to the report and recommendation (doc. 31-1) permits 14 days from receipt of the report and recommendation to file objections. Therefore, plaintiff had until January 30, 2012, to file objections or to timely request an extension of time to do so.

While the court is inclined to permit the late filing of objections, the objections would not cure plaintiff’s failure to file a statement of material facts and, therefore, would not alter the magistrate judge’s and this court’s conclusion that the evidence relied upon in the grant of the summary judgment motion was undisputed. Plaintiff was made aware of his obligation to respond to defendants’ statement of material facts through the Standing Practice Order issued in this case on April 25, 2011 (doc. 5). Plaintiff’s objections do not comply with the Middle District Local Rules of Court as advised through the Standing Practice Order.

Plaintiff still has time to file an amended complaint in an attempt to state a claim against the United States under the FTCA only and will be granted an extension to do so. Plaintiff is advised that failure to file a timely amended complaint will result in the dismissal of this action. An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: February 15, 2012.

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O R D E R

In accordance with the accompanying memorandum, **IT IS HEREBY ORDERED THAT:**

- 1) Defendant Loss is dismissed for plaintiff's failure to state a claim against him in the amended complaint.
- 2) Plaintiff's motion for an extension to file objections to the report and recommendation is granted but the objections are moot without a statement of material facts.
- 3) Plaintiff shall have until March 9, 2012 to file a second amended complaint in an attempt to state a claim against the United States pursuant to the Federal Tort Claims Act.
- 4) This case remains referred to Magistrate Judge Smyser.

s/Sylvia H. Rambo
United States District Judge

Dated: February 15, 2012.